

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
77283-s76H BY THOMAS AND JANINE)
STELICK)

* * * * *

On May 19, 1992, the Department Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended denying the subject Application. A timely written exception and request for oral argument was received from the Applicants through Attorney, David L. Pengelly. Objectors John E. Notti Jr., Tracy G. and Jenny L. Stewart, William T. Gilleard, and Kay M. and Darlene Cotton submitted timely written responses to the exception. Oral Argument on the exceptions to the Proposal for Decision in this matter was held before the Assistant Administrator of the Water Resources Division on August 27, 1992, in Hamilton, Montana. On behalf of the Applicants, David L. Pengelly presented exceptions to the Proposal for Decision. Also appearing and responding to the exceptions were Objectors Vernett H. Ellis, William T. Gilleard, John E. Notti, Jr., and Charlynn J. Steele. Joyce Moerkerke and Darlene Cotton appeared at the oral arguments. Written letters were submitted by Leon Ebel and Kay Cotton indicating they were unable to attend the oral argument.

Additional written responses to Applicant's exceptions were received from Vernett H. Ellis, Charlynn J. Steele, and Jim and Joyce Moerkerke during oral argument. The written responses

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appear to have been submitted to the Department in a timely manner but were not part of the file. There was no objection to the acceptance of the additional written responses.

The Applicants take exception to the Hearing Examiner's ruling denying the Application. Specifically, the Applicants except to Finding of Fact 13, and Conclusions of Law 8, 9 and 10.

The Applicants assert Finding of Fact 13 contains the only information considered by the Hearing Examiner with respect to flow rate information on Sharrott Creek. The Applicants object to this Finding because it does not contain all the stream flow data which was accepted into the record. The Applicants state that the omitted evidence, taken together with the data set forth in Finding of Fact 13, demonstrate that water is available throughout the year at the Applicants' proposed diversion point. The Applicants contend that Finding of Fact 13 fails to consider the information contained in Exhibits 1 and 3 which were introduced by Objector Notti, and that the exhibits demonstrate there are flows in excess of 50 gpm in Sharrott Creek at a point below the Applicants' proposed diversion.

Objector Notti asserts that the record shows the flow information he presented was downstream of the proposed diversion point and at a point where upstream ditch runoff and other recharge waters have entered Sharrott Creek. He maintains the measurements do not indicate that water is available for appropriation at the Applicants' point of diversion.

I reviewed the record and conclude that Finding of Fact 13 does not contain all of the evidence concerning water availability on Sharrott Creek. However, Finding of Fact 20 does contain information concerning water availability of which Exhibit 1 and 3 are a part. Exhibit 1 is a graph showing the difference between the Department's flow estimates and the actual measurements taken at the second right diversion. Exhibit 3 is a map showing Sharrott Creek drainage and major diversions. The record contains qualifications to these exhibits that were made by Mr. Notti, and Objectors Gilleard and Stewart. Findings of Fact 17-19, 21, 22 and 24 contain facts concerning water availability from water users on the stream. Together, these Findings of Fact fairly represent the record concerning the facts pertaining to water availability at the intended point of diversion. It is the duty of the Hearing Examiner to weigh and balance the evidence and testimony in making findings of fact. The Hearing Examiner's findings are reversed only if they are clearly erroneous. See, Billings v. Billings Firefighters Local No. 521, 200 Mont 421 (1982). A finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been made." Wage Appeal v. Bd of Personnel Appeals, ___ Mont. ___, 676 P.2d 194, 198 (1984). In this case the judgments made by the Hearing Examiner are well reasoned and supported by the record and Finding of Fact 13 is not clearly erroneous, and will not be modified or rejected. Section 2-4-612, MCA.

The Applicants object to Conclusion of Law 8, that the Applicants have failed to show the proposed operation of the diversion works is adequate, on several grounds. The Applicants maintain the conclusion that the proposed measuring device might not work is an unsubstantiated hunch by the Hearing Examiner. The Applicants contend that the Hearing Examiner arbitrarily questions how the Applicants could measure the 50-gallon per minute flow rate with a bucket, and contend that at no time did the Applicants propose to use a "bucket"; that no one objected to the measuring procedure; and it is inappropriate to deny the application on this ground.

From the record, the Applicants' expert, Lee Yelin, did not specify the size of the container used to measure the outflow of the pond. Upon my review of the taped recording of the hearing, I heard Mr. Yelin use the term "bucket", and later say "drum or a bucket, whatever" and under cross-examination by Mr. Notti, Mr. Notti says "bucket" and Mr. Yelin says "yes." Regardless of what actually might be used, neither is adequate to frequently measure and manage the flows in and out of the pond from a highly appropriated stream. The record supports the finding that adjustments to the diversion and release amounts would have to be made daily and occasionally more than once per day during the irrigation season. The Hearing Examiner properly concludes that with the occurrence of groundwater and fluctuating stream flows, the method of operation of the diversion works is not adequate. Even if no one objects to the method of operation of the

diversion works, the Department must make a determination of adequacy. The proposed operation of the diversion works considered by the Hearing Examiner must also consider the components of management of the diversion including measuring devices. Therefore, Conclusion of Law 8 is accepted as proposed.

The Applicants also object to Conclusion of Law 8 to the extent the Hearing Examiner concludes there is no means of determining whether the pond will be consuming water from Sharrott Creek. The Applicants' expert witness testified that a pit would be dug and allowed to fill with groundwater. The Applicants assert that the groundwater level in the pit will be monitored together with management of the valves at the diversion from Sharrott Creek and the outlet from the pit so that the water diversion from Sharrott Creek will be nonconsumptive.

The Applicants similarly object to Conclusion of Law 9. The Applicants assert that substantial credible evidence was demonstrated that prior appropriators would not be adversely affected. The Applicants contend no adverse effect because the inflow and outflow will be adequately measured, the pond itself would not consume water, not increase evaporation, the outflow would be piped back to the stream, and initial fill would be outside the irrigation season.

The facts of record do not show the proposed use of water is non-consumptive. The Hearing Examiner concludes that there could be a consumptive use of water which would adversely affect the already short water supply. There is no evidence that the

outflow can be made to equal the inflow even if the flows can be accurately measured. If water is lost in storage in the pond into the porous subsoil for example, that loss would have to be made up with groundwater otherwise flowing toward the creek (before the pond was built). The Applicants' management of the diversion operation does not negate the effect if there is a consumptive use either through storage of the diverted water or delay of the surface flows of Sharrott Creek water during its journey from the creek, through the pond, and back to the creek. The Hearing Examiner's Conclusions of Law 8 and 9 are supported by the record and are adopted as written.

The Applicants object to Conclusion of Law 10, and contend there are sufficient waters available at the Applicants' proposed diversion during the period the Applicants seek to appropriate water. The Applicants assert there is sufficient evidence that water exists in the stream for the proposed non-consumptive use; the diversion would not significantly delay water to the stream; and the water would be returned to the stream above any downstream appropriators.

Conclusion of Law 10 concludes that the Applicants have not provided substantial credible evidence there are unappropriated waters in the source of supply during the proposed period of diversion. The Hearing Examiner points out that no measurements were made at the proposed point of diversion during the irrigation season, the critical period of the water year. The Applicants' experts, Land and Water Consulting, Inc., took

measurements (Finding of Fact 13) periodically from October 18, 1990 to March 16, 1992. No measurements were taken at the diversion point of the stream during the period of the irrigation season when most of the water rights are exercised. Measurements above by the U.S. Forest Service and below the diversion by Mr. Notti during the irrigation season are not relevant without adjustments for the intervening diversions and return flows of existing appropriators. There is considerable doubt about water availability during the irrigation season since the Applicants' expert could have easily measured water during the obviously critical water use period on Sharrott Creek. The Hearing Examiner's Conclusion of Law 10 is adopted as written.

Having given the exceptions and responses full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions and responses, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit 77283-s76H by Thomas and Janine Stellick is hereby denied.

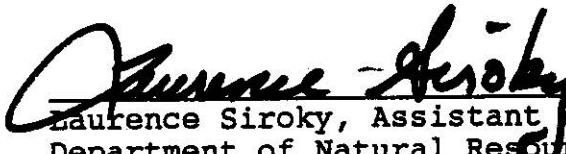
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 29 day of October, 1992.


Laurence Siroky, Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 29th day of October, 1992 as follows:

Tom Stellick
Janine Stellick
303 S. Kootenai Creek Rd.
Stevensville, MT 59870

David L. Pengelly
Knight, MacLay & Masar
P.O. Box 8957
Missoula, MT 59807-8957

Tracy G. Stewart
Jenny L. Stewart
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Charlynn J. Steele
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John E. Notti, Jr.
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Kay M. Cotton
Darlene Cotton
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William T. Gilleard
3803 Salish Trail
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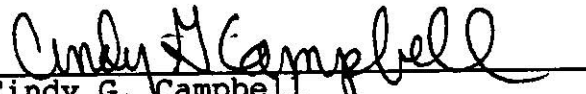
Vernett H. Ellis
3696 Silverthorn Drive
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Land & Water Consulting
& Lee Yelin
P.O. Box 8254
Missoula, MT 59807

Jim Moerkerke
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(Via E-Mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
77283-S76H BY THOMAS AND JANINE)
STELICK)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 2, 1992, in Missoula, Montana, to determine whether a Permit should be granted to Thomas and Janine Stellick for the above-entitled Application under the criteria set forth in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicants Thomas and Janine Stellick appeared at the hearing by and through Thomas Stellick and counsel David Pengelly.

Barry L. Dutton, President of Land and Water Consulting, Inc. (Land and Water) appeared at the hearing as an expert witness in the hydrology and soil sciences field for the Applicants.

Ross D. Miller, Hydrogeologist with Land and Water, appeared at the hearing as an expert witness for the Applicants.

Lee Yelin, Water Rights Specialist with Land and Water, appeared at the hearing as a witness for the Applicants.

Objector Vernett H. Ellis appeared at the hearing pro se.

Objector John E. Notti, Jr. appeared at the hearing pro se.

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Objector William T. Gilleard appeared at the hearing pro se.
Leo Lubbers appeared at the hearing as a witness for
Objector Gilleard.

Objectors Kay and Darlene Cotton appeared at the hearing pro se.

Objectors Jim and Joyce Moerkerke appeared at the hearing by
and through Joyce Moerkerke.

Objector Charlynn J. Steele appeared at the hearing pro se.
Objectors Tracy and Jenny Stewart appeared at the hearing
pro se.

Michael P. McLane, Manager of the Missoula Water Resources
Regional Office of the Department of Natural Resources and
Conservation (Department) appeared at the hearing as a staff
expert witness.

Lon Ebel appeared at the hearing as an interested person and
was allowed to make a statement on the record.

Several other interested persons appeared at the hearing as
observers.

Objector Baldwin Land Partnership did not appear at the
hearing and had not made prior explanation to the Hearing
Examiner, therefore in accordance with ARM 36.12.208, it is in
default, its objection is dismissed, and it no longer has status
as a party.

EXHIBITS

Applicants' Exhibit 1 is an aerial photograph of the area of
the Applicants' and Objectors' property. A Mylar overlay is

taped to the photograph. The Applicants' property, locations of pipelines, Sharrott Creek, and locations of downstream water users are identified on the overlay. This exhibit was received into the record without objection.

Applicants' Exhibit 2 is a topographic map showing the pond, the contours of the property, a cross-section of the pond and Sharrott Creek, the location of a wooden bridge, and an irrigation ditch. Mr. Gilleard objected to this exhibit because he disagreed with the placement of his irrigation ditch on the map. The Hearing Examiner is convinced the scale of the map confused Mr. Gilleard and that the map is correct. Objection is overruled and the exhibit is accepted into the record.

Applicants' Exhibit 3 consists of 12 pages and is a report prepared by Land & Water Consulting, Inc. on their hydrological investigation concerning the proposed pond near Sharrott Creek, in Ravalli County, Montana. Mr. Gilleard objected to the drawings in the report because he thought the placement of his ditches were in error. Again, the Hearing Examiner is convinced the scale of the drawings confused Mr. Gilleard and that the drawings are correct. Objection is overruled and this exhibit is accepted into the record.

Applicants' Exhibit 4 consists of five pages. Pages 1, 2, and 4 each have two photographs affixed to them. Page 3 has three photographs affixed to it. Page 5 has one photograph affixed to it. There is an explanation of each photograph, the person who took the photograph, and the date on which it was

taken on the page to which the photograph is affixed. This exhibit was accepted into the record without objection.

Applicants' Exhibit 5 is a copy of calculations performed by Lee Yelin using the Hazen Williams Equation to determine the flow rate through a three-inch and a four-inch diameter pipe. Objector John Notti objected to the inclusion of this Exhibit into the record on the grounds that this Exhibit was not disclosed during discovery. The exhibit was created the day of the hearing and could not have been disclosed before. Objection overruled and the exhibit is accepted into the record.

Applicants' Exhibit 6 is a single page with flow measurements of Sharrott Creek taken at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29 with the exception of the bucket and stopwatch measurement. This exhibit was accepted into the record without objection.

Objectors Cotton's Exhibit 1 consists of three pages and describes the existing water conditions on Sharrott Creek at several water right owners' property. This exhibit was accepted into the record without objection.

Objector Notti's Exhibit 1 is a graph showing the difference between the Department's flow estimates and the actual measurements taken at the second right diversion. The line across the graph at the 1000 gallons per minute (gpm) mark represents the second right apportionment. The graph shows no flow in Sharrott Creek in September and October; however, Mr. Notti stated there was flow in the Creek at this time, but it was

so low that he did not measure it. Also at this time 100 plus gpm of water was being diverted from Sharrott Creek into Ditch No. 9 (as shown on Notti's Exhibit 3) and Steele's ditch (also as shown on Notti's Exhibit 3) was receiving less than 100 gpm of water. This exhibit was accepted into the record without objection.

Objector Notti's Exhibit 2 is a graph showing the estimated high and low flow estimates by Mark Reller, formerly a Hydrologist III with the Department, and the total appropriations on Sharrott Creek. This exhibit was to show that even in the highest estimates of high water, the total appropriations from Sharrot Creek are above that estimation. Applicants objected to the inclusion of this exhibit into the record stating the exhibit may be an accurate representation of low and high flow estimated by the Department and the appropriations are shown in the records, but to the extent that it purports to show diversions above Applicants' point of diversion, he would object. Objector Notti stated the exhibit was not intended to show only diversions above Applicants' point of diversion. The exhibit was accepted into the record.

Objector Notti's Exhibit 3 is a map showing Sharrott Creek drainage and major diversions. Not shown on this map is that Applicants has rights out of ditches 5 and 6. This exhibit was accepted into the record without objection.

Objector Notti's Exhibit 4 consists of four pages and is a report written by Mark Reller concerning Sharrott Creek flow

estimates. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 1A is a plat map of part of Section 29. Certain acreage is outlined in yellow to identify properties that may be affected by the proposed appropriation. This exhibit was accepted into the record noting Applicants' comment that it represents ownership of people who live below them, but without further elaboration Applicants would object that it is an accurate representation of irrigated acreage below them. The Hearing Examiner agrees with the Applicants. There are no names on the maps to identify the owners of the properties and identify the pertaining water right. The exhibit is accepted into the record to show there are properties below the Applicants.

Objectors Stewart's Exhibit 1B is a plat map of part of Section 28. Certain acreage is outlined in yellow to identify properties that may be affected by the proposed appropriation. This exhibit was accepted into the record noting Applicants' comment that it represents ownership of people who live below them, but without further elaboration Applicants would object that it is an accurate representation of irrigated acreage below them. The Hearing Examiner agrees with the Applicants. There are no names on the maps to identify the owners of the properties and identify the pertaining water right. The exhibit is accepted into the record to show there are properties below the Applicants.

Objectors Stewart's Exhibit 2 consists of ten pages prepared by the U.S Forest Service. The first page appears to estimate the flow of Sharrott Creek by comparing the actual measured flow of Bear Creek. The second page shows measurements and dates of measurements in 1987 which have been plotted on a graph. The third page appears to calculate the amount of sediment moved by the stream and to obtain that information, actual measurements of the stream flow were taken on various days in 1990. The fourth page contains flow measurements of Sharrott Creek on various dates in 1989. The fifth page appears to calculate the amount of sediment moved by the stream and to obtain that information, actual measurements of the stream flow were taken on various days in 1988. The sixth page appears to estimate the flow of Sharrott Creek by comparing the actual measured flow of Bear Creek. The seventh page appears to show the percentage of exceedence of Bear Creek, Kootenai Creek and Sharrott Creek. The eighth page shows a cross-section of Sharrott Creek at the location of a measuring station. The ninth page is a copy of a contour map. Page ten is a copy of a USGS quadrangle map that shows the drainage area of Sharrott Creek down to a point on the line between Section 19 and 20. Jenny Stewart assumed that point marked by a circled number 1 was the measuring location; however, this point is below the Kennedy Ditches, the Bosckis Ditch, and the Latta (Harrington) Ditch¹ and Ms. Stewart's testimony was that the measuring site

¹The names of ditches in this Proposal were taken from Department's Exhibit 1.

was above these ditches. There is a dot marked in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 and the Hearing Examiner, based on other calculations and notations on this page, believes this is the actual point of measurement. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 3 is a copy of a page from a letter from Wm. A. "Bill" Worf to Dale S. Thacker, District Ranger. A sentence and a phrase in the third paragraph have been highlighted. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 4 is four photographs of Sharrott Creek taken by Jenny Stewart on January 27, 1992, and affixed to a single sheet of paper. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 5 consists of four pages. The first page contains soil descriptions copied from the soil survey of Ravalli County by Jenny Stewart. The second page is the color code for the different soils as shown on the last two pages of this exhibit. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 6 is a letter to William A. Worf from Mick Iten, Conservation Technician with the Soil Conservation Service. The last sentence of this letter has been highlighted. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 7 consists of two pages which

contain most of the testimony presented during the hearing by Jenny Stewart. This exhibit was accepted into the record without objection.

Objectors Stewart's Exhibit 8 consists of two pages which are some of the questions asked during the hearing by Jenny Stewart. The comments in red are to be ignored at the request of Jenny Stewart. This exhibit was accepted into the record without objection.

Department's Exhibit 1 consists of three pages, each a copy of page 29 of the Water Resources Survey of Ravalli County. This exhibit was accepted into the record without objection.

The Department file was made available for review by all parties. Objector Notti objected to portions of the file becoming a part of the record. Mr. Notti objected to statements made on the 600 supplement submitted with the original application concerning the potential adverse impact to downstream users. Mr. Notti further objected to statements attributed to downstream users. He also objected to the calculations of oxygen content presented with the original application. There were other areas that Mr. Notti felt needed clarification. Mr. Notti stated that he would be satisfied with an opportunity to cross-examine the persons who had entered those pieces of evidence into the file. Mr. Notti was given opportunity to cross-examine those persons. The objection is overruled and the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

Applicants amended their Application at the beginning of the hearing. The original Application stated the proposed pond would have a surface area of .10 of an acre and would be 25 feet deep resulting in a 1.3 acre-feet capacity. Applicants determined that a reduced surficial area would be more desirable; however, the reduction of the surface area required a reduction in the pond depth in order to have stable side slopes. The reduced capacity of the proposed pond is .83 acre-foot.

Since this amendment reduces the size of the pond only and does not affect the total amount of water to be appropriated, there is no need to republish the Application as no objector or potential objector could be prejudiced by the amendment.

When the instant Application was submitted to the Department, there was no indication that the proposed appropriation would be non-consumptive. However, during processing by the Helena Processing Unit, the pond was designated as a flow-through non-consumptive fish pond and the public notice so stated. In a letter to Mike McLane dated September 25, 1991, Mr. Pengelly stated that with the exception of the stock water, the Applicants' proposed project is intended to be non-consumptive with respect to Sharrott Creek. He further stated the Applicants have chosen a pond site where there is a high groundwater table and that it was expected the pond would fill naturally without any direct diversion from Sharrott Creek once the excavation was made. The purpose of the Sharrott Creek

diversion is to provide flow-through water to freshen and oxygenate the pond. Lee Yelin testified during the hearing that Applicants would be filing a Notice of Completion of Groundwater Appropriation for the groundwater that would fill the pond after it is excavated.

Whether the proposed use of Sharrott Creek water was non-consumptive was discussed at length during the hearing. However, it appears that no one heard Mr. Yelin when he said that Applicants would be submitting a Notice of Completion of Groundwater Appropriation for the groundwater that would fill the pond. This being the case, it appears the proposed use of Sharrott Creek water is indeed intended to be non-consumptive and the public notice was correct.

During the hearing, Objector Notti objected to Barry Dutton presenting himself as a surveyor. At no time did Mr. Dutton present himself as a professional surveyor. He did sign one of Land and Water's forms next to the word surveyor; however there is no surveying information on the form and Mr. Dutton explained the signature was to identify the person who performed the work in the field.

Mr. Notti also objected to personnel from Land and Water presenting themselves as professional engineers. At no time during the hearing did any witness from Land and Water present himself as a professional engineer. Ross D. Miller was presented as an engineer-in-training, but it was clearly stated that he had not taken the professional engineer's test.

It was alleged at the hearing that several land owners were omitted in the notice process. Section 85-2-307, MCA, states in relevant part,

(1)(a) Upon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316. (emphasis added)

According to the Department file, Tom Sheely, a Water Rights Specialist formerly with the Department's Missoula Water Resources Regional Office, using the Department's point of diversion index (Department records), identified 27 water right owners who may be affected by the proposed appropriation. These persons were served with a notice of the proposed appropriation by first-class mail. The notice was also published in the Ravalli Republic on July 24, 1991. Therefore, the Department met its legal obligation for the notice procedure.

During the hearing there was much discussion concerning the Brown/Worf diversion and use of water. All objectors feel this project has adversely affected their water rights; however, there was no mention of whether the affected persons had pursued

available avenues for relief.' Regardless of whether the Brown/Worf appropriation has adversely affected the objectors, that diversion and water use has nothing to do with the instant case.

The Hearing Examiner stated her intent and there was no objection expressed to that intent to take administrative notice of the Department records, particularly the water right records of the objectors and a report complete with photographs of each of the objectors' diversion written by Michael McLane for the hearing In the Matter of the Application to Sever and Sell Appropriation Water Right No. V111165-76H by William A. Worf and Eva J. Worf and The Application to Sever and Sell Appropriation Water Right No. V151753-76H by Joseph E. Brown. Therefore the Hearing Examiner does take administrative notice of the aforementioned material.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by

Those water users who believe they have been adversely affected by the Worf/Brown change should contact the Missoula Water Resources Regional Office to determine the steps needed to mitigate the problem.

applying for and receiving a permit from the department."

2. Thomas and Janine Stellick duly filed Application for Beneficial Water Use Permit 77283-s76H with the Department on April 8, 1991. (Department file.)

3. Pertinent portions of the Application were published in the Ravalli Republic on July 24, 1991.

Eight timely and one untimely objections to the Application were received by the Department. Applicants were notified of the timely objections by a letter to David Pengelly dated August 21, 1991, and of the untimely objection by letter to the Applicants dated March 30, 1992. (Department file.)

4. Applicants seek to appropriate 50.00 (gpm) up to 80.16 acre-feet of water for a flow-through fish pond and .49 acre-feet of water for stock from Sharrott Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 9 North, Range 20 West, in Ravalli County.¹ The proposed period of appropriation and use is from January 1 through December 31, inclusive of each year. The proposed capacity of the off-stream pond, to be located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, is .83 of an acre-foot. (Department file and testimony of Lee Yelin.)

5. Originally Applicants planned to construct a standard concrete diversion that would have dammed the creek. However, the water would have backed up too far and at the suggestion of the Soil Conservation Service, Applicants decided on a drop inlet

¹Unless otherwise specified, all land descriptions are in Township 29, Range 20 West, in Ravalli County.

structure and a buried four-inch pipeline as the proposed means of diversion. The Applicants' drop inlet structure would have a screen placed over the top and would have rocks placed over the screen. At a distance of 30 to 50 feet from the pond, the proposed method of conveyance (the four-inch pipe) would be changed to an open ditch lined with an impervious material in which a parshall flume would be placed to allow aeration and measurement of the water before it enters the pond. A control valve would be placed in the intake pipe to allow control of the amount of water entering the pond. The control valve on the inlet could be set to limit the intake to 50 gpm no matter what rate Sharrott Creek is flowing. Water diverted into the pond would be returned to Sharrott Creek by means of an outlet structure constructed of 36 to 48 inch culvert cut in half and fitted with slide grooves to accommodate flash boards that would control the amount of water flowing out of the pond. This structure would be connected to a four-inch pipe in the bottom of the pond which would be buried the full distance from the pond to Sharrott Creek, with the exception of the valve location, to prevent seepage and evaporative losses. Because there is too much grade drop on the outlet side of the pond, a parshall flume could not be used to measure the outflow. Since gravity flow meters are very costly and do not function properly at times, Applicants propose to place a valve in the pipe that can be opened or closed and install a drum or bucket beneath the valve. By measuring the time needed to fill the drum, the flow rate of

water leaving the pond could be determined. A staff gauge would be installed in the pond so that the water level can be determined at a glance. (Testimony of Lee Yelin and Department file.)

6. There are times when the flow of Sharrott Creek is well in excess of 50 gpm and at other times, there is little or no water available for appropriation. If water from Sharrott Creek were not available for a period of time, the proposed pond would still be a viable pond provided water was available at least two-thirds of the time. Applicants expect to be able to divert 50 gpm from Sharrott Creek eight or nine months of the year. Any amount of water available for appropriation by the Applicants could be beneficially used as it would add oxygen and fresh water to the system. Applicants have researched the use of an aerator which would be installed if necessary. (Applicants' Exhibit 8, Objectors Stewart's Exhibit 2, Department file, and testimony of Lee Yelin.)

7. The stock portion of the Application is merely to acknowledge that stock would be in the area of the pond and would probably drink from it. Applicants have stock water rights on Sharrott Creek so any water consumed from the pond would be offset by the same amount of water not being consumed directly from Sharrott Creek by the livestock. (Testimony of Lee Yelin and Department file.)

8. Applicants have water rights on Sharrott Creek that could be changed to be used in a fish pond by applying for and

receiving an Authorization to Change Appropriation Water Right from the Department. Applicants could also excavate the pond location; let it fill with groundwater as they now plan to do; and by using an aerator, eliminate the need to divert water from Sharrott Creek to have a viable fish pond. Applicants would be required to file a Notice of Completion of Groundwater Development with the Department within 60 days after completion of the pond. (Testimony of Thomas Stellick and John Notti.)

9. Land and Water conducted a limited hydrological investigation to address questions raised by the objectors. In regard to the concern of the pond causing slope failure or slumping, it is extremely unlikely that the pond will have any effect on slope stability. Generally slope failure occurs in areas with much steeper slopes. The proposed pond would be constructed in a gently sloping area near a stream bottom.

Regarding the water loss by evaporation, it is unlikely the total annual water loss of the pond would be significantly different than the existing vegetation. The vegetation at the proposed pond site is very lush wetland vegetation. Wetland vegetation can transpire, over a period of a year, just as much as a pond surface can evaporate. Ponds may have significantly more evaporation loss than caused by plants in the late fall to early spring season when plants are not actively growing and water loss from a vegetative site is low. As plant growth increases in spring and early summer, the vegetation catches up with evaporation in relative water loss. Then, in the peak of

the growing season, when the vegetation is fully mature, it will surpass the evaporation in relative water loss. (Testimony of Barry Dutton and Applicants' Exhibit 3.)

10. To determine the direction of the groundwater flow, two observation wells were installed at the proposed pond site on January 22, 1992. One well (SWP-1) was located in the center of the proposed pond while the other (SWP-2) was installed at the edge of the proposed pond. SWP-1 was completed to a depth of 20.5 feet. SWP-2 was completed to a depth of 8.1 feet. A staff gauge was installed in the west bank of Sharrott Creek. The staff gauge was given an arbitrary elevation of 100.00 feet, which was also the level of the water in Sharrott Creek. SWP-1 on January 22, 1992, showed a groundwater elevation of 101.61 feet; on January 30, 1992, the groundwater elevation was 101.56 feet; on February 13, 1992, the groundwater elevation was 101.66 feet; and on February 15, 1992, the groundwater elevation was 101.71 feet. SWP-2 on January 22, 1992, showed a groundwater elevation of 98.90 feet; on January 30, 1992, the groundwater elevation was 101.18 feet; on February 13, 1992, the groundwater elevation was 101.23 feet, and on February 15, 1992, the groundwater elevation was 101.30 feet. There was a great deal of discussion concerning the measurement of SWP-2 taken on January 22, 1992. Mr. Miller suspected this measurement was either a measurement error or the pores of the soil were clogged by clay smeared on the sides of the pit during the construction of SWP-2. Objector Notti speculated that the reading was correct and that

water was being drawn from Sharrott Creek into the well. However, the final measurement taken on February 15, 1992, indicates the water level in the well was above the water level in Sharrott Creek.

It was determined the groundwater flows toward Sharrott Creek, thus the pond would not draw water from Sharrott Creek. Generally, groundwater measurements taken in January and February represent the lowest levels of groundwater during the year. Groundwater levels in this area will rise in the spring and summer. The water in Sharrott Creek will also rise, but that will not change the direction of the groundwater flow. The gradient is so steep that the groundwater will always flow to Sharrott Creek in this area. (Testimony of Ross Miller and Applicants' Exhibit 3.)

11. Concern was expressed that the proposed pond would draw water from O'Brien Ditch which is 30 to 40 feet higher in elevation than the pond. This ditch now loses water because the soil in the area is very porous. Water is being driven through the bottom of O'Brien Ditch by hydraulic head. Construction of the proposed pond will not change that fact. If the proposed pond were completely dewatered, then the hydraulic gradient would be steepened and assuming the water table is connected with the bottom of O'Brien Ditch, water could then be drawn from the ditch; however, there is no intent to pump water from the pond. The intent of the Applicants is to excavate a pond which intercepts the groundwater. There is a speculative statement in

a letter dated May 31, 1991, from Lee Yelin to Tom Sheely, that at some future date the Applicants may be filing for a change in point of diversion for his irrigation water and that the means of conveyance and distribution system may be changed from the headgate/ditch/flood system to a pump/sprinkler system from the pond. However, that is not the intent of the instant Application. (Department file, Applicants' Exhibit 3, and testimony of Ross Miller, Lee Yelin, Objector Gilleard, Jenny Stewart and Objector Notti.)

12. The standard for water quality in a stream such as Sharrott Creek is seven milligrams of dissolved oxygen per liter (mg/l) of water. Mont. Admin. R. 16.20.618 and 16.20.621 (1988). Water exposed to the surface regardless of its dissolved oxygen content will become saturated (containing 12 to 13 mg/l) after it flows a certain distance at certain temperatures. That does not mean Sharrott Creek water could become saturated with dissolved oxygen by flowing over certain distances during the summer months.

In the summer when the temperature is high and the flow of Sharrott Creek is low, Sharrott Creek is subject to algae bloom. Dead fish have been seen in Sharrott Creek during algae bloom periods. However, the water was not tested for chemical content at that time so the cause of death is not known.

By the time Sharrott Creek enters Applicants' property it has flowed through several other properties picking up various minerals and chemicals all of which diminish the oxygen content

of the stream.

The design and management program proposed by Land and Water for Applicants' fish pond includes monitoring the levels of oxygen in order to avoid overstocking or understocking the proposed pond and to meet the requirement that water discharged into the stream meets the standard of seven mg/l. (Testimony of Lee Yelin and John Notti.)

13. Lee Yelin measured or was present when measurements were taken of the flow of Sharrott Creek at a point approximately 70 feet downstream from Applicants' proposed point of diversion in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, periodically from October 18, 1990, to March 16, 1992. All measurements are in gallons per minute. Mr. Yelin measured the following flow rates: October 18, 1990 - 250; November 7, 1990 - 225; March 25, 1991 - 520; April 1, 1991 - 842; September 8, 1991 - 135; October 11, 1991 - 72; November 21, 1991 - estimated less than 50; February 13, 1992 - 164; and March 16, 1992 - 589.

Measurements were taken of the flow of Sharrott Creek at various times at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 by the U.S. Forest Service. All measurements are in cubic feet per second.' The U.S. Forest Service measured the following flow rates in 1987: April 20 - 2.74; April 22 - 6.12; April 27 - 25.17; May 4 - 19.5; May 12 - 36.10; May 18 - 19.1; May 26 - 13.00; June 1 - 13.00; June 8 - 24.70; June 15 - 8.9; June 22 -

'One cubic foot per second = 448.8 gallons per minute.

5.16; August 4 - 1.38; August 25 - 1.34; September 24 - .276; and October 5 - .245. In 1988, the U.S. Forest Service measurements were: April 22 - 10.63; April 29 - 8.68; May 6 - 8.15; May 12 - 20.86; May 19 - 20.32; May 26 - 41.02; June 2 - 20.21; June 9 - 25.61; June 17 - 18.94; June 24 - 12.10; June 30 - 6.36; July 8 - 3.71; July 29 - .91; and August 19 - .36. The U.S. Forest Service measurements in 1989 were: April 10 - 3.98; April 19 - 11.87; April 26 - 10.8; May 3 - 9.93; May 10 - 61.32; May 17 - 21.5; May 26 - 15.02; June 6 - 43.94; June 15 - 49.90; June 19 - 27.47; June 30 - 16.67; July 6 - 9.29; and July 21 - 3.93. In 1990 the U.S. Forest Service measurements were: April 11 - 6.25; April 19 - 15.11; April 25 - 19.66; May 2 - 8.65; May 9 - 7.66; May 16 - 9.89; May 22 - 8.96; May 30 - 31.95; June 6 - 15.84; June 21 - 43.31; and July 12 - 8.17. The measurement location is immediately above the diversions for the Kennedy Ditches, the Bosckis Ditch, and the Latta (Harrington) Ditch. (Testimony of Lee Yelin and Jenny Stewart, Applicants' Exhibits 6 and 4, Objectors Stewart's Exhibit 2, and Department records.)

14. Applicants would allow a court-appointed water commissioner to enter their property at any time to measure the water flowing into and out of the proposed pond and with reasonable notice would allow a representative of all the objectors to observe the water entering and leaving the proposed pond. (Testimony of Lee Yelin and Thomas Stellick.)

15. Objectors are averse to having a water commissioner appointed to admeasure and distribute the waters of Sharrott

Creek. They believe a water commissioner would be an expense few of the objectors could afford. The water users of Sharrott Creek, with the exception of the first right holder, have worked out a system of sharing the water so that everyone gets some water, regardless of priority. (Testimony of Jenny Stewart and John Notti.)

16. Addressing the criteria that a proposed appropriation must not adversely affect the water rights of prior appropriators, Lee Yelin made a statement in item B of a letter dated May 31, 1991, to Tom Sheely, that he had contacted the furthestmost downstream junior appropriators to see if they had any problems obtaining their water and that Mr. Eric Spiess and Mrs. John Notti had stated they had no problem obtaining their water and they have never been called by senior users. During the hearing, it was brought out that Mr. Spiess does not have a water right on Sharrott Creek and that Mrs. Notti denied making the statement attributed to her and further stated she was talking about the water rights on McCalla Creek. (Department file and testimony of Lee Yelin and John Notti.)

17. Sharrott Creek, also known as Sharratt Creek (Cherreete, Cherette), is a decreed stream. On the 27th day of March, 1922, Judge James M. Self entered a decree allotting a total of 910 miner's inches of the waters of Sharratt Creek by priority. Rose Latting was decreed a priority date of the Fall of 1881 to appropriate 75 miner's inches (1.875 cfs) to irrigate property in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 20; the heirs of J. F. Sullivan

were decreed a priority date of April 1, 1882, to appropriate 60 miner's inches (1.5 cfs) to irrigate acreage in the N $\frac{1}{2}$ NW $\frac{1}{4}$ and the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 28; John O'Brien was decreed a priority date of July 1, 1883, to appropriate 20 miner's inches (0.5 cfs) and a priority date of April 1, 1884 to appropriate 130 miner's inches (3.25 cfs) for irrigation of acreage in the NE $\frac{1}{4}$ of Section 29; T. M. Couch was decreed a priority date of November 1, 1884, to appropriate 75 miner's inches (1.875 cfs) and a priority date of December 10, 1887, to appropriate 25 miner's inches (0.625 cfs) to irrigate acreage in the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 28; the heirs of W. J. Kennedy were decreed a priority date of May 1, 1888 to appropriate 80 miner's inches (2.0 cfs) for irrigation of acreage in the E $\frac{1}{2}$ of Section 30; Henry Weicher was decreed a priority date of April 1, 1895, to appropriate 50 miner's inches (1.25 cfs) to irrigate acreage in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19; E. F. Hill was decreed a priority date of April 1, 1895, to appropriate 75 miner's inches (1.875 cfs) for irrigation of acreage in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17; and the heirs of W. J. Kennedy were decreed a priority date of August 11, 1902, to appropriate 320 miner's inches (8.0 cfs) to irrigate property in the S $\frac{1}{2}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29. (Department records.)

18. Objectors Kay and Darlene Cotton have lived on their place for 24 years. Over the years Kay Cotton has noticed the aquifers go down and irrigation water from Sharrott Creek become less and less. The Cotton children used to fish in Sharrott

Creek most of the summer. Sharrott Creek supported trout at that time, but now it does not. Kay Cotton believes the most dramatic drop has occurred in the last three or four years since the Worf diversion was begun. At that time the water users on Sharrott Creek were told the Worf project would not adversely affect them, but the Cottons believe it has. In order to maintain their property value and their quality of life, the Cottons believe no more appropriations can be made on Sharrott Creek. The Cottons have excavated areas on their property and found gravel veins that flow water. They have captured waste water with shallow wells to be used for irrigation. According to Kay Cotton, everytime something is done upstream, it starts modifying water availability downstream and jeopardizes the Cottons' ability to capture their waste water and priority rights on the stream. Kay Cotton obtained statements concerning water availability from water users of Sharrott Creek. The central theme of these statements is that everyone is suffering from reduction in surface water and the aquifer.

Kay and Darlene Cotton have filed Statement of Claim W148040-76H with the Water Court claiming a right to appropriate 11 miner's inches up to 38.5 acre-feet per year of the waters of Sharrott Creek for irrigation of 11 acres. The claimed priority date is May 16, 1972. They also have filed Statement of Claim W029202-76H claiming a decreed right with a priority date of November 1, 1884, to appropriate 5.2 miner's inches up to 37 acre-feet per year of the waters of Sharrott Creek to irrigate

11.05 acres. The Cottons have filed Statement of Claim W029203-76H claiming a decreed right with a priority date of December 1, 1887, to appropriate 1.8 miner's inches up to 12.43 acre-feet per year of the waters of Sharrott Creek to irrigate 11.05 acres. Statement of Claim W029205-76H was filed by the Cottons claiming a decreed right for stock water to be diverted at a rate of 5.2 miner's inches up to 1.00 acre-foot per year. The claimed priority date is November 1, 1884. Statement of Claim W029204-76H was filed by the Cottons claiming a decreed right for stock water to be diverted at a rate of 1.8 miner's inches up to 1.00 acre-foot per year. The claimed priority date is December 1, 1887. (Testimony of Kay Cotton, Objectors Cotton's Exhibit 1, and Department records.)

19. William Gilleard is concerned that Applicants' proposed pond will adversely affect his ability to irrigate and that the pond will drain his ditch. The O'Brien Ditch has historically lost water through the rocky soil. The seepage from the ditch then became available for downstream use. Mr. Gilleard believes the pond will stop the return of this water to the creek. Further, Mr. Gilleard fears the construction of a pond in the near proximity of Sharrott Creek will consume water from the Creek through unmeasurable seep from Sharrott Creek to the excavated pond.

Statement of Claim W010158-76H was filed by William Gilleard claiming a decreed right for 20 miner's inches up to 37.38 acre-feet of water per year from Sharrott Creek for irrigation of 6.00

plus acres. The claimed priority date is April 1, 1882.

Statement of Claim W010157-76H was filed by William Gilleard claiming a decreed right for 5.06 miner's inches up to 37.38 acre-feet of water per year from Sharrott Creek for irrigation of 6.23 acres. The claimed priority date is May 30, 1885.

Statement of Claim W015419-76H was filed by William Gilleard claiming a decreed right for 20 miner's inches up to 1.00 acre-foot of water per year from Sharrott Creek for stock water. The claimed priority date is April 1, 1882. Statement of Claim W010158-76H was filed by William Gilleard claiming a decreed right for 5.06 miner's inches of water up to 1.00 acre-foot of water from Sharrott Creek for stock water. The claimed priority date is May 30, 1885. (Testimony of William Gilleard, Department records, and Cottons' Exhibit 1.)

20. Last year Mr. Notti was able to get only two short four day irrigations cycles, one in May and one in June. After that the water was so low he could not divert. Mr. Notti then began making measurements at the flume identified in Notti's Exhibit 3 because he had concerns about the water and wanted to know where it was going. He also measured Kootenai Ditch since that ditch flows into Sharrott Creek and the amount of flow in the ditch had to be subtracted from the flow rate measured at the flume to obtain a true flow rate of Sharrott Creek. Mr. Notti also made estimates of the flow in Ditches 7 and 9 (the Sullivan Ditches). At this time, Mr. Notti made a conscious decision that they were worse off than he. It has been acknowledged that the flow of

Sharrott Creek has been low for years and the method that has been used, with which Mr. Notti is in full accord, has been to talk with each other and adjust the diversions so everyone receives some water.

Mr. Notti does not believe the Applicants have shown need for the water nor does he believe Applicants have shown beneficial use. Mr. Notti does not believe Applicants have shown the means of diversion or operation of the appropriation works are adequate. Nor does he believe Applicants have shown there is water available for appropriation.

Statement of Claim W007297-76H was filed by Perry Hochstetler claiming a decreed right to 20 miner's inches up to 47 acre-feet of water per year from Sharrott Creek for irrigation of 53 acres. The claimed priority date is April 1, 1882. On October 14, 1988, a Water Right Transfer Certificate was received by the Department transferring a portion of this water right to Richard Lutz from Albert Cavanaugh who had purchased a portion of the property from Hochstetler. Cavanaugh had transferred his entire portion to Lutz. The amount of the portion of the water right was not stated. However, the transfer indicated the irrigated acreage was 23.56 acres. On April 18, 1990, the Department received a Water Right Transfer Certificate transferring the same portion of the water right and the 23.56 acres to John Notti from Richard Lutz. The exact amount of this water right will not be known until after the final decree is issued by the Water Court. (Testimony of John Notti and

Department records.)

21. Charlynn Steele has owned her property for ten years and has seen the available water in Sharrott Creek decline considerably in the past several years. Ms. Steele owns a horse raising operation and uses Sharrott Creek water for stock and irrigation. Ms. Steele has gone to considerable expense and effort to be able to receive her full amount of water. Further, Ms. Steele is concerned about the environment. There have been trout in the stream in years past, now as the water levels drop, she does not see as many fish.

Statement of Claim W107633-76H was filed by Carl and Nancy Scott claiming a decreed right for 3.75 miner's inches up to 15 acre-feet per year of water from Sharrott Creek for irrigation of 10 acres. The claimed priority date is April 1, 1882. Charlynn Steele purchased Carl and Nancy Scott's property and filed a Water Right Transfer Certificate with the Department on September 20, 1985, for appurtenant water right. (Department records and Cottons' Exhibit 1.)

22. Vernet Ellis has grown hay regularly since moving to his current residence. In the last four years, Stewarts have purchased hay from Mr. Ellis. Each year the hay production has declined and the only circumstance that is different is the water availability. Mr. Ellis acknowledges some of the reduction in water availability is due to the weather, but has noticed a marked decrease in water availability since Worf began diverting water.

Statement of Claim W004101-76H was filed by Vernet Ellis claiming 25 miner's inches up to 50 acre-feet of water per year from Sharrott Creek to irrigate 18.5 acres. The claimed priority date is December 10, 1884. (Testimony of Jenny Stewart, Cottons' Exhibit 1, and Department records.)

23. Statement of Claim W015459-76H was filed by Dan O'Brien claiming 130 miner's inches up to 765 acre-feet per year of the waters of Sharrott Creek for irrigation of 140 acres. The claimed priority date is April 1, 1884. Statement of Claim W015460-76H was filed by Dan O'Brien claiming 20 miner's inches up to 135 acre-feet of water from Sharrott Creek for irrigation of 140 acres. The claimed priority date is July 1, 1883. On February 6, 1990, a Water Rights Transfer Certificate was received by the Department transferring a portion of these water rights to James and Joyce Moerkerke for irrigation of 20 acres. (Department records.)

24. According to Jenny Stewart, there are 18 persons and/or properties that will be adversely affected by the proposed appropriation. The number of persons and/or properties that may be affected, according to Ms. Stewart, is six. These water users are above Applicants' property and have seventh, eighth, and ninth water rights out of Sharrott Creek. The use of the water for these users has been up to November 1. However, last year they were shut off in July 15.

Not only is Sharrott Creek greatly over-appropriated, according to Jenny Stewart, the water table has also dropped in

recent years. Last month the Stewarts' well went totally dry and they have had to drill another well. The Stewarts' pond has been dry all winter. Ms. Stewart believes the proposed project will affect stream flows and will change the underground recharge because of the soil characteristics in the area. Further, Ms. Stewart believes the proposed project will adversely affect the natural aquatic ecosystem. The Stewarts believe the proposed pond will be consumptive and that the pond will drain more months out of the year than it will accumulate water. From the time the Stewarts moved onto their place in 1988, they have never received their total decreed water right for irrigation that was transferred to them with the property.

Statement of Claim W111158-76H was filed by Armand Westfall claiming 4.68 miner's inches of water up to 15 acre-feet of water from Sharrott Creek for irrigation of 5.00 acres. The claimed priority date is November 1, 1884. Statement of Claim W111159-76H was filed by Armand Westfall claiming 1.56 miner's inches up to 14 acre-feet of the waters of Sharrott Creek for irrigation of 5.00 acres. The claimed priority date is December 1, 1887. On May 16, 1988, a Water Right Transfer Certificate was received by the Department transferring these water rights to Tracy and Jenny Lee Stewart. (Testimony of Jenny Stewart and Department records.)

25. Applicants own the proposed place of use. (Department file.)

26. There are no planned uses or developments for which a

permit has been issued or for which water has been reserved that would be affected by the proposed project. Frederick F. Burnell and William A. Worf hold Permit 51996-76H for power generation that has not been perfected; however, their point of diversion is upstream of the Applicants' proposed point of diversion and their priority date precedes that of the Applicants. (Department records and testimony of Lee Yelin.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator

will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses, a flow-through fish pond and stock water, are beneficial uses. Mont. Code Ann. § 85-2-102(2)(1989). Applicants would beneficially use all the water diverted. There is no evidence in the record that Applicants would waste water. See Findings of Fact 5, 6, 7, and 9.

Objector Notti stated he did not believe Applicants had shown need for the water. See Finding of Fact 20. The criteria for issuance of a permit does not include a requirement that an applicant must show need. Nor does the fact that Applicants have alternatives for a viable fish pond enter into the criteria for a permit. See Finding of Fact 8. The requirement is that the use is a beneficial use. The fact that Applicants have alternatives for the proposed pond does not bind the Applicants to use those

alternatives rather than apply for a new permit. See generally Boyd v. Huffine, 144 Mont. 306, 120 P. 228 (1911); In re Application G65713-76N by Fagan; In re Application 43117-s41P by Mancoronal.

5. Applicants have possessory interest in the property where the water would be put to beneficial use. See Finding of Fact 25.

6. The proposed project would not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 26.

7. Applicants have provided substantial credible evidence the proposed means of diversion and construction of the appropriation works are adequate. See Findings of Fact 5, 6, 11, and 12.

8. Applicants have failed to show the proposed operation of the diversion works is adequate. Applicants propose to dig the pit and allow it to fill with groundwater, then use Sharrott Creek water to flow through to supply oxygen and freshen the water. See Preliminary Matters supra at pg 10. However, Applicants have not shown how a Water Commissioner, if one were appointed, or Department personnel would be able to ascertain the groundwater level in the pond while Sharrott Creek water was flowing through the pond and whether water was truly flowing through or if it was being stored. Moreover, the proposed method of measuring the water flowing out of the pond is questionable.

See Finding of Fact 5. While flows up to 20 gpm might be measured with a bucket and a stopwatch, measuring 50 gpm by that method strains the credibility.

If the intended use is truly nonconsumptive, the Applicants must be able to show that condition. The proposed means of operation and means of measuring the water flowing out of the pond cannot show that condition.

9. Applicants have not provided substantial credible evidence the water rights of prior appropriators would not be adversely affected. The criteria for nonconsumptive use is that there would be little or no diminution in supply and the water would be returned to the source of supply sufficiently quickly that little or no disruption would occur to stream conditions below the point of return. In re Applications 49573-s43B by Carter; In re Application 29912-s41I and 29913-s41I by Loomis. Since there is no proposed method to determine the groundwater level and whether Sharrott Creek water was flowing through the pond, it is possible the Sharrott Creek water would be stored resulting in diminution in supply as well as delay in returning the water to Sharrott Creek causing disruption in stream conditions below the point of return.

10. Applicants have not provided substantial credible evidence there are unappropriated waters in the source of supply during the proposed period of diversion. It is true measurements were taken by Land and Water; however, no measurements were taken by Land and Water during the irrigation season. The U.S. Forest

Service measurements cannot be used as evidence of available water since those measurements were taken above all the existing diversions on Sharrott Creek and cannot be used as an indicator of the manipulated reaches of the stream. See Finding of Fact 13.

There is evidence in the record that some of the objectors are experiencing water shortages now. See Findings of Fact 18, 20, 22, and 24. Further consumptive use of Sharrott Creek could only worsen the situation.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 77283-s76H by Thomas and Janine Stellick is hereby denied.

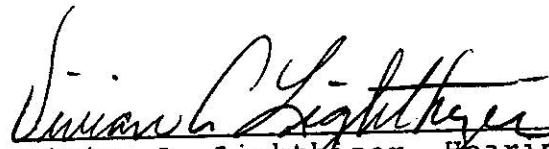
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The defaulted objector is restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulting objector on other substantive issues.

CASE # 77283

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 19th day of May, 1992.



Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 19th day of May, 1992 as follows:

Tom Stellick
Janine Stellick
303 S. Kootenai Creek Rd.
Stevensville, MT 59870

Tracy G. Stewart
Jenny L. Stewart
3736 Salish Trail
Stevensville, MT 59870

Charlynn J. Steele
3824 Salish Trail
Stevensville, MT 59870

Baldwin Land Partnership
% Carl W. Baldwin, Jr.
3533 Salish Trail
Stevensville, MT 59870

John E. Notti, Jr.
121 S. Kootenai Creek Rd.
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William T. Gilleard
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